

ATTACHMENT C
RESPONDENT'S ARGUMENT



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Re **In the Matter of the Cancellation of the Application for Industrial Disability Retirement of HARRY MOHAN SINGH DHESI, Respondent, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, STATE PRISON, SACRAMENTO COUNTY, Respondent**
OAH CASE NO.: 2013030889
CALPERS AGENCY CASE NO.: 2012-0976
Written Argument for Hearing dated September 20, 2016

Members of the Board:

The Proposed Decision Should Be Rejected as it Reduces the Jurisdiction of Calpers Concerning Determination of Issues under the PERL

Jurisdiction to Determine Reasonable Accommodation

In the proposed decision of ALJ Erin R. Koch throughout her opinion indicated that legal determinations relevant to the instant case were not within the jurisdiction of CalPERS. The first abdication of jurisdiction is on p. 4 of the Proposed decision in foot note 4 wherein she states:

“Respondent asserts that he was never provided a full-time dental assistant. However, failure to accommodate a “disabled” employee is a violation of the FEHA; jurisdiction for such a claim is in superior court or as an affirmative defense at the SPB.”

The ALJ also states at p.7 footnote 7 states: “Respondent asks this Board to make a finding against CDCR for its failure to accommodate him. The Board does not have jurisdiction to make such a finding”

Respondent Dhesei objects to these abdications of jurisdiction as the determination as to whether

there was a failure to accommodate Respondent Dhesi (hereinafter “Respondent”) is relevant to the determination whether he was substantially incapacitated from the performance of his duties and as such something within the jurisdiction of CalPERS. The mere fact that he did pursue a FEHA claim or raise his disability as an affirmative defense in the SPB Board should not preclude him from raising the issue as it relates to the PERL on the separate issue of whether he was disabled. Respondent had no legal requirement to file a FEHA complaint and any determination of a defense in the SPB manner would have been made by his attorney.

Here the ALJ’s **finding NO. 20** specifically states that “Dr. Abels was clear that respondent was, at all times, capable of completing the essential functions of the Dentist job with accommodation. Her conclusion, by definition makes respondent ineligible for a disability retirement under the substantially incapacitated standard.”

Therefore, the determination as to whether Respondent was denied a reasonable accommodation is in fact essential to the ALJ’s determination of whether he was disabled. As such, in order to effectively determine whether “Respondent was substantially incapacitated from his duties,” it was necessary to make a foundation as to whether he had been provided an effective reasonable accommodation. As such, the instant matter should be **Remanded** to the ALJ to make a finding as to whether there was a failure to reasonably accommodate Respondent as if there was no reasonable accommodation, he would have been disabled.

The Instant Matter should be remanded to determine whether California Department of Corrections and Rehabilitation violated California Government Code §21153 and §129253.5

The decision of the ALJ at pp. 7-8 states as follows:

“Respondent asks this Board to make a finding against CDCR for its failure to file a disability retirement application on respondent’s behalf, under Government Code section 19253.5, subdivision (i)(1); or in the alternative, allow respondent’s application under the principles of equity because of CDCR’s failure. To that end, respondent alleges that CDCR knew, that without reasonable accommodation, respondent was unable to perform the work of his position and they were therefore obligated to file for disability retirement on his behalf. **First, the Board does not have jurisdiction to make a finding against CDCR.** Second, assuming, *arguendo*, CDCR had filed an application on respondent’s behalf, simply filing an application does not mean CalPERS would grant disability retirement to the applicant. Third, California Government Code section 19253.5, subdivision (i)(1) requires an employee to be “unable to perform the work of his or her present position or any other position in the agency.” There are no facts in the record to support such a conclusion.”

The ALJ ignores the fact that it is Government Code §21153 that Respondent indicated was violated. It is the obligation of CalPERS to enforce the PERL which includes Government Code

§21153. PERS is the agency responsible for awarding disability retirement in this case. (§§ 20001, 20058.) PERS law (§ 20000 et seq.) provides a forum for appealing involuntary disability retirement (§ 21156). Therefore, CalPERS does have jurisdiction to make a finding as to whether CDCR should have filed an application for retirement. To not do so, would further encourage agencies like CDCR to continue to default in proceedings like this in which they are listed as a Respondent. Here CDCR claimed they were not a party in the instant matter, as such a default finding against them would be appropriate to encourage them to participate.

Government Code § 19253.5 is a procedural mechanism from which a state agency determines medical terminations and a manner to comply with the requirements of Government Code § 21153. Government Code § 19253.5 (i)(1) provides for the manner in which the State can file a disability retirement. The right regarding no termination if an employee is disabled is pursuant to California Government Code § 21153. In fact, Government Code §19253.5 (i)(2) refers to Government Code §19253.5 specifically indicating that allowing the removal of an employee so long they can exhaust leave and be paid. This section does not divest CalPERS of jurisdiction under Government Code §21153. Further, CalPERS has a vested interest that CDCR complies with Government Code §19253.5 and does not file discipline when a retirement is available. Here Respondent did not work as a dentist since November 2007 and the termination was in March 2009. If CDCR had complied with the provisions of Government Code §19253.5, they would have had to have a medical evaluation to assist CalPERS and there would have been plenty of time for CalPERS to make a consideration on accepting the application. To allow an Agency to do nothing to advance its obligations under Government Code §21153 by complying with Government Code §19253.5, would defeat the purpose of the PERL to ensure eligible beneficiaries receive mature benefits.

Further, contrary to the ALJ's indication that there was no job at CDCR that Respondent could do, the evidence at the hearing indicated that Respondent could not perform the job duties of the warehouse work as well as even work in the mail room. (See Exh. XXXXX , 5:7-30:13.) The fact, on 4/9/07, Dr. Park (the Acting CDCR Regional Dental Director, Region 1 which included oversight of CSP-Sacramento) in an e-mail to Dr. Kuykendall concerning Dr. Dhesi stated as follows: **"If this dentist is not able to meet the original Minimum Qualifications as a Dentist, CF, should they not be initiating a Fit for Duty and possibly Medically Retiring this candidate."** (Exh. QQQQQ, ¶4, Exhibit GG, p. 3 of 4.) Further, Fran Conlin of June 21, 2007 wherein she stated:

"We'll continue to work with Dr. Dhesi here until he reaches the point where his limitations become so restrictive that he can't work at all. As you know, he already has medical restrictions regarding patient care. If his new claim results in restrictions to the "desk work" as well, there won't be anything we can do for him anyway. I think it is inevitable that we'll end up there, sooner or later." (Exh. SSSSS, ¶ 25; O'Neill Decl., ¶8, Exh KK..)

The mere fact that Respondent continued to come to work does not establish that he was not substantially incapacitated from the performance of his duties. The testimony of Dr. Dhesi and the other dentists shows that he was not able to perform his duties as he could not do physical activities which were essential to his job duties. (See Exh. XXXXX, p. 14:16-16:14.)

In fact, the evidence cited shows that the Department itself was considering retiring him prior to his termination and believed that he would not be able to do the essential functions of his job and he was substantially incapacitated from his duties as a foregone conclusion from their actions taken towards him. (See Exh. XXXXX, pp. 16:15-29:13.) This is readily apparent due to as he was even unable to function in his placement in the warehouse and the mailroom. He did not perform any functions of a dentist in fact, since November 8, 2007.

Further, the matter should be remanded as it would have been incumbent on CDCR to show that there were available jobs which he could do. Which is another reason for CalPERS to assert jurisdiction to ensure compliance with Agencies such as CDCR to ensure active participation of the Employing Agency. Additionally, CDCR was on notice of the need to comply with the procedures under Government Code §19253.5 and did nothing.

Objection to Findings 12, 13, and 14

Respondent objects to the ALJ's findings 12,13, and 14, to the extent that the ALJ is indicating that Dr. Abels found him to be disabled only from a warehouse job and not that of the Dental position. Dr. Abels in making her determination that Dr. Dhesi was disabled on July 17, 2008, reviewed the job description for a dentist. (TR 3/21/16, 29:11-23.)

Dr. Abels specifically testified that Dr. Dhesi's physical condition resulted in him being substantially incapacitated from his job duties by discussing what he did physically in his job that would be disabling. (TR 3/21/16, 34:10-36:6.)

Dr. Abels testified went on to testify that the earliest date Respondent was unable to do the usual and customary duties of his job as a CF Dentist was on 12-7-07 and at the very latest it would be on July 17th, 2008, the date that she indicated he was permanently disabled in her Medical Report to Cal PERS. Dr. Abels testified that by July 2008 Respondent's condition worsened since November 2007 And by July 17, 2008, she also found he was not able to do the warehouse job. (TR. 3/21/16, pp. 49:14-50:19, 51:2-7, Exhs. W, GGG.)

Dr. Abels clarified her selection of the 7/17/08 as the last date of disability as that occurred after his exacerbation of his injury in the warehouse and his condition had deteriorated as result of a flare-up of pain and possible re-injury. (TR 3/21/16, 76:9-81:1, Exhs. W, GGG, p. 974, GGGG pp. 1218, 1219.)

Dr. Abels also opined as follows:

“ THE ADMINISTRATIVE LAW JUDGE: My question is at what point in time would you answer no to the first question regarding his ability to complete the essential functions? Would it be at the time in which the reasonable accommodation you suggest is no longer viable to assist Dr. Dhesi in completing the essential function of his job?

THE WITNESS: **I think that is one scenario, certainly.**

THE ADMINISTRATIVE LAW JUDGE: Okay.

THE WITNESS: But also, realistically, these were being set as things that should have been done for him to allow him to function, so I would say that in the absence of reasonable accommodation, that he probably should not have been working as a dentist. (TR. 3/21/16, pp. 69:23-70:11.)

Objection to Finding No. 15 to the extent that finding number 15 implies that Dr. Abel's decision was based solely on her own findings and relied heavily on subjective complaints. In fact, Dr. Abels testified not only on her own notes and observations but also on medical reports and opinions by orthopedic doctors. Further, Dr. Abels testified that she can and does diagnose patients as having lumbar disc protrusion.

Dr. Abels testified that she relied upon the QME report from Dr. Nyak (TR 3/21/16, pp. 27:11-28:7.) This also included reviews of MRI scans which confirmed the subjective complaints of pain being made by Respondent due to disk protrusion, L5-S1 annual rear, and displacement of right S1 root. (TR 3/21/16, 47:16-48:17.)

Dr. Abels specifically testified that Dr. Dhesi's physical condition resulted substantially incapacitated him from his job duties by discussing what he did physically in his job that would be disabling. (TR 3/21/16, 34:10-36:6.) Dr. Abel's testimony concerning plaintiff's inability to do his essential job functions was buttressed by the other supervising CDCR Dentists Dr. Kuykendal, Dr. Park, Dr. Maciel, and Dr. Weisman. (See Exh. XXXXX, pp. 14:16-16:3.) Dr. Dhesi also confirmed the work functions and his inability to do them. (See Exh. XXXXX, pp. 14:16-16:3.)

The ALJ's Decision Does Not Address the Maturity Date Issue Raised on Appeal and Should Be Remanded for That Consideration

The ALJ's decision fails to address the date of maturity issue. It appears to do so by claiming that there is no need to make a determination on the date due to the erroneous position that Respondent was being reasonably accommodated. Respondent contends that the date of maturity is the date he was terminated in March 2009 due to equitable estoppel principles. (See Exh. XXXXX, pp. 2:1-p.4:19.)

Closing Argument

As stated in Respondent's Closing Brief and Reply Brief, this is a unique case where an individual employed as a Dentist at CDCR-SP Sacramento was terminated over 1 year and 4 months after he stopped working as a Dentist. Respondent last worked as a dentist on November 8, 2007. He was not terminated until March 3, 2009, and during that period of time was assigned to the warehouse and then to the mailroom.

Prior to November 8, 2007, CDCR knew that Respondent could not perform his duties as a Dentist due to medical restrictions for which he was given a reasonable accommodation of having a chairside assistant. Here Respondent was given a reasonable accommodation in name only. The fact of the matter is that the dental assistant assigned to Dr. Dhesi in fact did not provide chairside assistance to him. This was a fact known by his supervisors Dr. Maciel and Dr.

Weisman to whom Respondent reported such problems.

CDCR had an obligation under Government Code §21153 to retire Respondent instead of firing him when they terminated him. Here they knew they were not reasonably accommodating him. They also had a history with Respondent of him previously having to go off work for extended period of times due to his physical back conditions. This included times where he was off work for months. In the process of the reasonable accommodation process, Dr. Park (the Acting Regional Dentist) and Fran Conlin (the RTW Coordinator) both showed knowledge that inevitably he would need to be retired.(See Exh. XXXXX, pp.22:23-28, 24:18-22.)

Knowledge of CDCR's duty to retire Respondent if he was disabled was even in the options letters which were given to Respondent on multiple occasions. When Ms. Conlin met with Dr. Dhesi she discussed this option with him. (TR 3/9/16, pp. 38:23-39:3, 39:10-17; TR 3/21/16, 105:11-106:15.) Dr. Dhesi testified that he relied upon that fact that if the Department felt he was disabled that they could file an application for retirement on his behalf, in fact it was something that had been discussed with an early intervention counsel in 2005 after he returned from an 11 month absence. (TR 3/21/16, 106:16-21.).

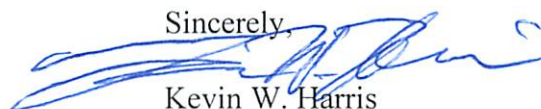
So CDCR knew they had a disabled employee who needed reasonable accommodation which they were not actually providing him prior to even moving him to the warehouse. Respondent was not physically able to do the warehouse job and in fact exacerbated his physical back injury while in the warehouse in July 2008. Dr. Abels' Physician Report to CalPERS indicated at that time he was unable to do his job as a Dentist. Regardless of whether CDCR was going to proceed with disciplinary action against Respondent the facts at that time would indicate that he is unable to return to his job duties as a Dentist.(See Exh. XXXXX, pp. 16:15-29:13.)

CDCR had a duty under the PERL to file for his retirement and/or comply with Government Code §19253.5 and did not, Respondent relied upon CDCR's representations that they could retire him. If CDCR had filed the retirement action, it did not preclude them from proceeding with a disciplinary action against Respondent. (See *Hughes v. County of San Bernardino* (2016) 244 Cal. App. 4th 542, and *Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24.) The only effect would be that Respondent could not be reinstated if he got better. Therefore, the application should be accepted as if CDCR had filed for plaintiff's retirement instead of moving to terminate him. As such, then his application would have been timely. Equitable principles dictate the Dhesi's application for disability retirement should be accepted.

Position on Precedential Decision– The most significant issues were not resolved by the ALJ, namely the mature date. Further, the jurisdictional issues regarding the obligation to file for retirement by CDCR under California Government Code §21153 and the effect of failure to accommodate should be reconsidered by the Board and may be relevant for the Board to designate the decision as precedent.

Dated: September 9, 2016

Sincerely,



Kevin W. Harris

Attorney for Respondent Dhesi